

**Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, D.C. 20554**

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FEDERAL COMMUNICATIONS COMMISSION  
WASHINGTON, D.C. 20554

In the Matter of

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| Amendment of the Commission's Rules        | ) |                      |
| to Relocate the Digital Electronic Message | ) |                      |
| Service from the 18 GHz Band to the        | ) | ET Docket. No. 97-99 |
| 24 GHz Band and to Allocate the            | ) |                      |
| 24 GHz Band for Fixed Service              | ) |                      |

**WEBCEL'S REPLY TO OPPOSITIONS TO PETITIONS FOR RECONSIDERATION**

WebCel Communications, Inc. ("WebCel"), by its attorneys, hereby replies to the oppositions to petitions for reconsideration of the March 14, 1997 Order in this docket, by which the Commission relocated and substantially expanded the spectrum allocated for Digital Electronic Message Service ("DEMS").<sup>1</sup>

**INTRODUCTION**

The only oppositions to WebCel's petition for reconsideration come from Teligent, L.L.C. ("Teligent"),<sup>2</sup> and Teledesic Corporation, the very parties that benefited from Commission adoption of the *DEMS Order*. Although their support for the FCC's adoption of their "consensual" relocation plan is not surprising, what is unconscionable is opponents' mischaracterization and misapplication of settled law to defend the secret procedures used in this docket.

Neither Teligent nor Teledesic addresses the validity of the DEMS licenses in the first instance, a necessary predicate to any lawful relocation. Both ignore the difference between

<sup>1</sup> *Amendment of the Commission's Rules to Relocate the Digital Electronic Message Service From the 18 GHz Band to the 24 GHz Band and to Allocate the 24 GHz Band for Fixed Service*, Order, ET 97-99, FCC 97-95, 12 FCC Rcd. 3471 (released March 14, 1997) ("*DEMS Order*"), 62 Fed. Reg. 24,577 (May 6, 1997). By Order released July 18, 1997, the International Bureau extended the time for filing replies until July 23, 1997.

<sup>2</sup> As WebCel has demonstrated previously by reference to Teligent's own corporate documentation, the three parties filing the "Joint Opposition" in this proceeding are actually one group of affiliated corporations. WebCel Opposition to Joint Motion to Exceed Page Limit at 1-2 (filed July 7, 1997).

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terminating 18 GHz DEMS service to protect government earth stations from interference, which has national security consequences in certain cities, and moving DEMS nationwide to 24 GHz, which has no impact whatsoever on national security. NTIA's recommendation is not dispositive and, as the precedent relied on by the *DEMS Order* makes clear, a public NPRM must be issued when private licensees are transferred to newly available spectrum, especially when an expansion of the service or allocated spectrum is involved.

Finally, Teligent's new justifications for the purported "comparability" of 400 MHz allocation, on reconsideration, cannot supply the record lacking in this proceeding. Without a public rulemaking, the Commission has no adequate basis under the Administrative Procedure Act to support the critical technical findings necessary for the *DEMS Order*.

## DISCUSSION

### I. THE COMMISSION HAS A RESPONSIBILITY TO INVESTIGATE THE VALIDITY OF THE DEMS LICENSES BEFORE RELOCATION OR SPECTRUM ALLOCATION

Neither opposition addressed the threshold issue of the Commission's neglected responsibility to investigate and publicly resolve *prima facie* charges made against the validity of the DEMS licenses.<sup>3</sup> Teledesic, the original complainant, ironically opted not to address this issue at all. Teledesic Opp. at 7 n.13. Teligent, while not discussing the Commission's responsibility to investigate, did defend one of the several charges raised originally by Teledesic<sup>4</sup> — that Teligent, then known as Associated, failed to meet the build-out requirements of Section 21.43 of the Commission's Rules. Teligent Opp. at 6; Teligent Opp. at 34-35.

Teligent claims that it fully met the build-out requirements when the *DEMS Order* was issued, and therefore is eligible for the transfer. This position is based solely on a pair of letters from the Wireless Bureau to attorneys for Teligent's subsidiaries, MSI and DSC, purportedly confirming their "timely construction and operation of its entire DEMS systems." Teligent Opp.

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<sup>3</sup> *Consolidated Petition to Deny and Petition to Determine Status of Licenses*, FCC File Nos. 9607682, 1787-CE-P/L-94 & 5386-CE-P/L-94, 306-CE-P/L-94 (September 6, 1996).

<sup>4</sup> *Id.* at 15.

at 6 n.14. Despite Teligent's contentions, neither of these letters was ever received by WebCel or its counsel, and neither was ever made part of the public record in this docket. *Id.* More importantly, these letters were not written until a full month *after* the *DEMS Order* was issued. Thus, even if these Staff letters satisfied the Commission's legal duty to investigate the validity of Teligent's licenses, which they do not,<sup>5</sup> they took place after the Commission had agreed to transfer all of the licenses as valid.

Teligent also briefly replied to the original Teledesic charge that Teligent inappropriately obtained multiple licenses in the same standard metropolitan statistical area ("SMSA") in violation of Commission rules. 47 C.F.R. §§ 21.502, 101.505. Teligent's claim that it was granted "waivers to construct and operate multiple DEMS channel systems in 25 of its 27 SMSA's," Teligent Opp. at 5, mysteriously cites as evidence only one *application* for licenses *filed by MSI* in Pittsburgh, *id.* at 5 n.12, and pointedly cannot rely on *any* Commission Order (or even Staff letter) actually granting these waivers. Nor does Teligent mention what waivers its other subsidiaries have sought, or attained, from the Commission.

Teligent's claim of right to all DEMS channels under the "waiver by implication" theory cannot be squared with routine Commission practice. Because the granting of five 20 MHz channels to one entity in a significant number of SMSAs is the technical equivalent of creating a new 100 MHz telecommunications service, the Commission is required to hold a public rulemaking and receive comment on the new service, and at the very least is required to affirmatively and publicly grant any multichannel waivers for them to be valid.

## II. NATIONAL SECURITY EXEMPTION TO THE APA SHOULD BE READ NARROWLY TO INCLUDE ONLY THE TERMINATION OF THE DEMS INTERFERENCE WITH MILITARY EARTH STATIONS AT 18 GHz

In their zeal to defend the Commission's failure to follow the Administrative Procedure Act ("APA"), and therefore secure for themselves invaluable blocks of public spectrum, Teligent

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<sup>5</sup> The Commission has a legal responsibility to investigate and publicly resolve the challenges to Teligent's DEMS licenses despite the consensual withdrawal of Teledesic's charges. WebCel Petition at 8 (citing *In re Booth American Company*, 58 FCC.2d at 554).

and Teledesic have mischaracterized both fact and law. The oppositions inaccurately rely on *Bendix Aviation Corp. v. FCC*<sup>6</sup> to justify the FCC's use of the national security exemption to the APA to suspend notice and comment while performing the distinct steps of removing DEMS licensees from 18 GHz and awarding them a 300% increase in public property at 24 GHz.

In reality, the only DEMS-related issue that deserves national security treatment, the only proceeding that *is* in fact covered by *Bendix*, is the initial eviction from 18 GHz of private licensees potentially interfering with two government earth stations. The subsequent move of DEMS licensees to 24 GHz involves no identified national security interest, and is not exempt from notice and comment under *Bendix*. The opponents' incorrect analysis would extend the scope of *Bendix* far beyond its facts and create a dangerous legal fiction completely at odds with the APA's purpose of open government.

A. *Bendix* Does Not Eliminate the Commission's Responsibility to Conduct a Notice and Comment Rulemaking When Transferring DEMS to 24 GHz

Both Teligent and Teledesic cite *Bendix* for the proposition that, under the national security exception, the Commission could move DEMS licensees out of 18 GHz and transfer them to 24 GHz without public notice or comment. Teligent Opp. at 12; Teledesic Opp. at 9. However, *Bendix* was strictly a review of the Commission's use of the national security exemption in moving the license holders *out* of their existing spectrum location. *Bendix did not address the transfer of the licensees to a different part of the spectrum.* In fact, a separate Notice of Proposed Rulemaking, issued the same day as the order evicting the license holders in *Bendix* from 8.5 GHz, followed normal APA procedures in asking for public comment on the transfer of the displaced license holders to a newly-available home on the spectrum (13 GHz). 23 Fed. Reg. 2698 (April 23, 1958) ("1958 NPRM").

The limited utility of *Bendix*, and the fundamental misrepresentations by Teligent and Teledesic, are thus apparent. *Bendix* holds only that a legitimate national security concern

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<sup>6</sup> 272 F.2d 533 (D.C. Cir. 1959), *cert. denied*, 361 U.S. 965 (1960).

regarding interference from private license holders, as found by the executive branch, can result in FCC suspension of the APA's notice and comment requirements for the limited purpose of terminating the interfering licenses. *Bendix*, 272 F.2d at 533. Nothing in *Bendix* supports secret proceedings for the transfer of dispossessed licensees to a newly released block of spectrum. Teligent's assertion that "[t]he Commission's reliance on *Bendix* to *relocate* DEMS was procedurally proper," Teligent Opp. at 9 (emphasis added), is patently false. The 1958 NPRM completely dismantles this argument because it shows that the narrow national security exemption is limited to just the first step of removing the offending private licensee. Just as in *Bendix*, the Commission is now legally required to conduct an open rulemaking on the relocation of the DEMS licensees to 24 GHz.

B. NTIA's Communications Do Not Justify the Commission's Broad Use of the National Security Exemption

Teligent's defense of the Commission's actions improperly relies on NTIA's request that the DEMS relocation "be undertaken on an expedited basis." Teligent Opp. at 8. If the Commission was under any legitimate national security pressure to act quickly (a questionable argument considering the six months of *ex parte* negotiations that took place between the parties before the *DEMS Order* was issued), it was only with regard to the interference and eviction of licenses operating at 18 GHz. No similar national security concerns require the Commission to expedite the subsequent relocation of DEMS to 24 GHz.

Teligent now effectively concedes this point by asserting the existence of a public interest, rather than a national security concern, with the quick build-out of the DEMS licenses (also implausible considering the many years that the DEMS licenses have been dormant). Teligent Opp. at 10.<sup>7</sup> While there may or may not be a legitimate public interest in rapid DEMS development, it is certainly not an issue covered by the national security exemption. There is nothing related to which spectrum, or how much spectrum, to allocate to DEMS that is even

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<sup>7</sup> "If the Commission had opened a rulemaking proceeding separate from the eviction of DEMS from 18 GHz to determine the DEMS destination spectrum, it would have irreparably harmed DEMS licenses and DEMS consumers and therefore disserved the public interest."

remotely associated with the military or national security. Therefore, because Teligent concedes that the APA's "good cause" exemption is inapplicable, Teligent Opp. at 21,<sup>8</sup> any rulemaking must include notice and comment.

Teligent's expansion of the national security exception is particularly offensive considering the settled principal that "Congress intended the military function exception to have a narrow scope." *Independent Guard Association of Nevada v. O'Leary*, 57 F.3d 766, 769 (9th Cir. 1995). Teledesic attempts to distinguish *O'Leary* on the ground that the "civilian" Department of Energy — the keeper of the country's nuclear warfare secrets — is somehow less directly involved in national security, and was given less deference on national security issues than should be given to NTIA in this case. That is absurd. As the Ninth Circuit explained: "[t]he DOE's statutory mandate includes responsibility for research and development of all energy resource applications, *as well as national security functions relating to nuclear weapons research and development.*" *Id.* (emphasis supplied).

In fact, the court rejected DOE's use of the national security exemption in *O'Leary* for the very same reason the Commission's overly broad use of the exemption should be rejected in this proceeding — in both cases the agency seeks a "broad interpretation of the exception" to cover subjects that are not "directly involved" in the agency's military function. *Id.* In *O'Leary* the DOE regulation covered independent security guards not directly involved in the military functions of the agency. *Id.* In the *DEMS Order*, the Commission extended the exemption to cover the relocation of the DEMS licensees to 24 GHz, not the termination of their 18 GHz licenses to protect government military uses from possible interference. See WebCel Petition at 9-11.

Both Teligent and Teledesic also grant self-interested deference to NTIA's request that DEMS be relocated at 24 GHz, suggesting it is somehow dispositive "that NTIA itself requested

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<sup>8</sup> The D.C. Circuit has ruled that time constraints are insufficient grounds for the Commission to invoke the "good cause" exemption to the APA. *New Jersey Dept. of Environmental Protection v. EPA*, 626 F.2d 1045 (D.C. Cir. 1980). See WebCel Petition at 10 n.27.

that DEMS be relocated to the 24 GHz band, on a nationwide basis, in order to clear DEMS incumbents from the 18 GHz band.” Teledesic Opp. at 8; Teligent Opp. at 13. NTIA’s statutory role in the DEMS proceeding is, however, strictly limited to two functions. First, as trustee of government spectrum, NTIA had the authority to communicate to the Commission the national security ramifications of potential interference between private license holders and government earth stations at 18 GHz. 47 U.S.C. § 901(b)(2)(J). Second, NTIA had the authority to release government spectrum at 24 GHz and provide that newly-available spectrum to the Commission for distribution. 47 U.S.C. § 902(2)(B). *NTIA lacks the statutory authority to direct the Commission to place, expand or create a new a particular service or a set of license holders in a specific frequency.* Any policy advice from NTIA regarding the use of the spectrum made available to the Commission is just that — advice. It is the role of the Commission to “[a]ssign bands of frequencies to the various classes of stations, and assign frequencies for each individual station and determine the power which each station shall use and the time during which it may operate.” 47 U.S.C. § 303(b). Thus, the oppositions’ reliance on NTIA’s 24 GHz proposals as a basis for APA exemption is an inappropriate extension of NTIA’s statutory authority and a plain attempt to bootstrap the national security exemption to an action that is beyond its legitimate scope.

### III. THE PETITIONERS CLEARLY HAVE STANDING TO CHALLENGE THE *DEMS ORDER*

Respondents’ challenge to WebCel’s standing to seek reconsideration is wholly contrary to settled law. Teligent Opp. at 22-25; Teledesic Opp. at 13-15.<sup>9</sup> They fundamentally misunderstand the requirement of standing for administrative proceedings, relying instead on

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<sup>9</sup> The FCC included a requirement that “[i]ncumbent licensees will have 30 days from the date of release of this Order to protest the license modification.” This language cannot, however, vitiate Section 405 of the Communications Act, in which Congress defines standing for reconsideration. Teledesic argues that incumbent licensees remain the only parties to this proceeding that have legitimate interest in its outcome. To this end, Teledesic quotes a section of the *DEMS Order* that is merely intended to determine a schedule for any subsequent pleadings. Teledesic Opp. at 13. Not only has Teledesic cited inappropriate authority for its argument, but it has provided an analysis that would vitiate the entire concept of standing.

precedent concerning judicial standing under Article III, which is inapplicable to administrative agencies. Section 405, which sets out the standing requirements for reconsideration of a formal FCC rulemaking, provides that after the Commission has issued an Order, “any party thereto, or any other person aggrieved or whose interests are adversely affected thereby, may petition for reconsideration.” 47 U.S.C. § 405. The circumstances of this case irrefutably demonstrate that WebCel’s interests are “adversely affected.”

WebCel is a telecommunications company preparing to bid for spectrum at 28 GHz to offer Local Multipoint Distribution Service (“LMDS”). With 400 MHz at 24 GHz, DEMS licensees will be able to compete with LMDS providers for parts of its bundled service. WebCel in fact would have had an interest in acquiring spectrum at 24 GHz had this newly and suddenly-released spectrum been made available to the public whether by auction or for free. WebCel can now only participate in competitive bidding for spectrum at 24 GHz after the market has been made unstable by the Commission’s arbitrary giveaway of spectrum to the DEMS licensees. Therefore, not only must WebCel pay for spectrum while its competitor holds up to 400 MHz nationwide for free, but the instability in the spectrum market likely will make it more difficult for WebCel to obtain financing for the forthcoming LMDS auction. Thus, it is evident that WebCel’s interests have been harmed by the Commission’s Order and that it now has standing to challenge the Order on reconsideration.

The FCC cases cited by Respondents are no more relevant. Teligent relies on *SunCom Mobile & Data, Inc. v. FCC*, 87 F.3d 1386 (D.C. Cir. 1996), a case that is entirely inapposite to the present proceeding. First, in *SunCom*, prospective licensees appealed a Commission decision that denied a declaration of compliance for stations that did not yet exist. That the appellants lacked standing is intuitive, for without actual technical compliance data, only “‘conjectural’ or ‘hypothetical’” injury could be shown. 87 F.3d. at 1388 (citations omitted). Secondly, *SunCom* discusses only whether licensees had standing to appeal a Commission decision to the D.C. Circuit, not whether the licensees could seek *administrative* review, as in the present case.

Were the Commission to accept Teligent's argument, virtually all notice and comment regarding spectrum allocation and license applications would be foreclosed to anyone except current licensees for the specific service. According to this logic, whenever the Commission redesignates spectrum for other use, only incumbent licensees in the same band would have standing to express concerns. Such a notion is completely inimical to the concept of competition, because emerging technologies and services would be excluded from consideration for spectrum. Furthermore, when (as here) an FCC decision favors incumbent licensees, under Teligent's approach the only parties with standing would be those benefiting from the Commission action, not those adversely affected. Therefore, the Commission must recognize that WebCel has standing to challenge the newly found free allocation of spectrum in this case.

#### IV. THE COMMISSION IMPERMISSIBLY INCREASED THE ALLOCATED DEMS SPECTRUM FROM 100 MHz TO 400 MHz

The hasty allocation of an additional 300 MHz of spectrum as "compensation" for the relocation of DEMS licensees was improper in both procedure and substance. Allocation of spectrum remains of vital public interest and therefore must be performed in open proceedings. In the context of relocation, the question whether engineering realities require additional spectrum similarly deserves public scrutiny. Teligent's bald assertion that the allocation was "necessary" is patently inadequate, on its face, to support the Commission's decision. Teligent Opp. at 25-33.

##### A. Respondents' Assertions That Additional Spectrum Was Necessary Does Not Validate the Allocation of New Spectrum to DEMS

Teligent broadly asserts that it deserves an additional 300 MHz at 24 GHz "because of the laws of physics." Teligent Opp. at 25. Since, as discussed above, there are no national security arguments available to justify the allocation of spectrum at 24 GHz in secret, this rulemaking is subject to the procedural requirements of the APA. The policy and technical question of whether "the laws of physics" actually warrant additional allocation requires critical public and well-documented analysis from all interested parties and especially the FCC. Five

pages of self-serving, *ex post facto* technical analysis does not a rulemaking make. Teligent Opp. at 25. The proper place for presenting such analysis remains the public forum *prior* to a rulemaking, not during reconsideration.

B. Teligent Misuses the Concept of “Comparability” to Defend the Allocation

Teligent misrepresents the Commission’s conclusion in the *Microwave Relocation Order*<sup>10</sup> and places inordinate reliance on the Commission’s policy of providing “comparable facilities” for relocated incumbents. *See* Teligent Opp. at 25-33. Although the Commission did hold that incumbents must be relocated to facilities that are comparable in throughput, reliability and operating cost, 11 FCC Rcd. 8840, *it also made clear that comparability will be assessed as to systems that are in actual use*. The Commission firmly stated that “PCS licensees will only be required to provide incumbents with enough throughput to satisfy their needs at the time of relocation, rather than to match the overall capacity of the system.” *Id.* at 8841. The Commission further stated that “the public interest would not be served if spectrum is automatically held in reserve for all incumbents with the expectation that some may require additional capacity in the future.” *Id.* Teligent certainly falls within the latter description, because its system remained in the “design” phase when it received the 400 MHz allocation.<sup>11</sup>

Teligent disputes the fact that its systems were not operational even in the face of public statements by its own counsel.<sup>12</sup> As WebCel noted in its Petition, the general counsel of Teligent (at that time called Associated) stated after the release of the *DEMS Order* that at year-end 1996, the company had *begun* offering point-to-point service to businesses and *planned* to offer point-to-multipoint service by the end of 1997 *at the earliest*.<sup>13</sup> Yet Teligent insisted in February 1997, and the Commission agreed, that it would require an additional 300 MHz to “maintain” this

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<sup>10</sup> *Amendment to the Commission’s Rules Regarding a Plan for Sharing the Costs of Microwave Relocation*, WT Docket No. 95-157, FCC 96-196, 11 FCC Rcd. 8825 (rel. April 30, 1996).

<sup>11</sup> Throughout 1996, MSI and DSC, subsidiaries of Teligent, “were continuing to construct their systems.” Teligent Opp. at 7. As of January 7, 1997, “DEMS deployment was further complicated,” which is to say that no system was in operation. *Id.* at 7.

<sup>12</sup> Teligent Opp. at 6 & n.6.

<sup>13</sup> WebCel Petition at 7 n.21 (citing “Mandl’s Move to Tiny Start-Up Spotlights Wireless Rush,” *Wall Street Journal*, Aug. 21, 1996, at B1, and “New Options for WLL Service,” *Wireless Week*, Mar. 24, 1997, at 27).

fictitious network. It is curious that Teligent was able to calculate so clearly what would be “comparable” to such “facilities.” What is more upsetting, and procedurally improper, is that the proceeding remained closed, affording Teligent the luxury of providing unrefuted data that is of questionable relevance and validity, in a “consensual” setting where no party had any incentive to critically examine its assumptions and conclusions. WebCel Petition at 13.

C. Respondents Misstate the Role of the NTIA Regarding the Allocation

Respondents contend that NTIA concurred with, if not required, the Commission’s decision to allocate an additional 300 MHz of spectrum to Teligent nationwide.<sup>14</sup> They contend that “NTIA concurred with the Commission,” Teligent Opp. at 28, or even “requested [that] the Commission adopt[] the more sensible approach of protecting incumbents with established rights.” Teledesic Opp. at 15.

In making this cognitive leap, Respondents attempt to protect the decision to allocate that spectrum under the cloak of NTIA’s military security function. As shown above, NTIA lacks the authority to direct the Commission on non-government use of spectrum. Appropriately, the Commission does not make this assertion. In the *DEMS Order*, the Commission explains that NTIA “has made *available* 400 megahertz of spectrum” in the 24 GHz band, but that “*we find that 400 megahertz of spectrum in the 24 GHz band will provide DEMS with service equivalent to that at 18 GHz.*”<sup>15</sup> Thus, the decision to grant a four-to-one increase in spectrum lies solely with the Commission. Likewise, reconsideration of that decision must be undertaken by the FCC itself, and should be completely distinct from the NTIA-directed, national security-driven proceeding clearing 18 GHz of potential private interference.

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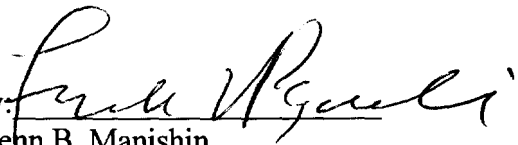
<sup>14</sup> Teligent Opp. at 28; Teledesic Opp. at 15.

<sup>15</sup> *DEMS Order* ¶ 12 (emphasis supplied).

## CONCLUSION

For all these reasons, the Commission should accept the substantive and procedural changes called for in the WebCel Petition for Reconsideration.

Respectfully submitted,

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Dated: July 23, 1997.

**CERTIFICATE OF SERVICE**  
**ET Docket No. 97-99**

I, Amy E. Wallace, do hereby certify on this 23rd day of July 1997, that I have served a copy of the foregoing document via first class mail, postage prepaid, to the parties below:

  
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